IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 739 OF 2005

Umashankar V. Vishwakarama .. Appellant

Vs.

Municipal Corporation of Gr. Mumbai. .. Respondent

Mr. Omprakash Tiwari with Mr. Ashok Mishra for appellant.

Ms. Geeta Joglekar for respondent.

CORAM: B.H. MARLAPALLE, J.

Date : July 19, 2005.

P.C.:

1. The learned Judge of the City Civil Court at Mumbai by the impugned order dated 5/4/2005 had declined to pass ad-interim order in Notice of Motion No.2449 of 2005 moved in L.C. Suit No.1586 of 2005. In this appeal it has been vehemently contended by the learned counsel for the appellant that after the impugned order was passed on 5/4/2005 the officers of the Corporation acted contrary to the undertaking given by them before the trial court and which undertaking reflects in the impugned order to the

following effect:-

> "Advocate for BMC/Deft. on taking instructions from officer Mr. P.N. Mistry from P/North Ward makes a statement that at present BMC is not going to undertake the work of change of direction of the gutter. She further makes a statement that at present there is open gutter. She further makes a statement that BMC would undertake the project to connect small drain opposite to the room of the plff. to the bigger drain which is towards East side."

2. It was contended that after this undertaking was furnished, the officers of the Corporation undertook the construction of gutter and in such a fashion that the drain water will move from East to West and this would be contrary to the undertaking furnished.

3. Pursuant to the order passed by this court, Mr. Mistry has filed affidavit in reply and at the

first instance he states that in the undertaking recorded before the trial court he had not stated that bigger drain is located to the East side of the plaintiff's room. Corporation's sketch has been annexed to the affidavit and it is stated that the bigger drain located on the West side of the plaintiff's room. The learned counsel for the appellant states that the sketch attached to the affidavit in reply is false and, therefore, he prayed for appointment of a Court Commissioner.

4. From the affidavit in reply of Mr. Mistry it is also clear that the Notice of Motion came up for hearing before the trial court on 5/7/2005 when he produced the sketch which is attached to this affidavit in reply and in any case the Notice of Motion is still pending. It has been further stated in the affidavit submitted by Mr. Mistry today that the work of drainage has been completed by now and the appellant is not at all affected and there is no nuisance of drain. By way of rejoinder submitted by the appellant, these submissions have been disputed.

5. Be that as it may, this appeal against the ad-interim order need not be kept pending when the trial court is seized of the Notice of Motion and it is now fixed on 30/7/2005. The appellant may apply to the court below either under Order 39 Rule 2A or take out separate motion for appointment of Court Commissioner. In any case it is further to be noted that the trial court will consider the issue of construction of the drain work and appropriate relief to be granted to the appellant while deciding the Notice of Motion and if the trial court comes to the prima facie conclusion that the construction of drain is illegal, it would grant appropriate relief.

6. Appeal disposed off.

(B.H. Marlapalle,J.)